

**Thousand Springs Water Users Association, Inc.
PO Box 178, Hagerman, ID 83332**

August 2, 2004

Via email (water@lso.state.id.us) & fax (334-2125)

Natural Resources Interim Committee
Legislative Services Office
State Capitol
P.O. Box 83720
Boise, Idaho 83720-0054

Re: IGWA's Proposed Eastern Snake River Basin Settlement Agreement

Dear Interested Parties & Members of the Natural Resources Interim Committee:

The Board of Directors of the Thousand Springs Water Users Association (TSWUA) has reviewed the "Proposed Agreement For Long-Term Conjunctive Management For the Eastern Snake River Basin" that has been distributed by the Idaho Groundwater Appropriators, Inc. (IGWA). The purpose of this letter is to advise the Committee and Interested Parties that the proposed agreement is not acceptable to the TSWUA.

The purpose of the TSWUA is to promote the common interests of our members in restoring our water supplies in the Thousand Springs reach and the hydraulically connected Eastern Snake Plain Aquifer, and to obtain mitigation and other forms of relief for our losses resulting from declining spring water supplies. The TSWUA was created as a necessary step to reach and implement The Eastern Snake Plain Aquifer Mitigation, Recovery And Restoration Agreement for 2004 (ESPA Agreement). The Interim Committee and the interested parties are now attempting to modify that Agreement to reach an even longer-term agreement to address the ESPA water crisis. In the ESPA Agreement, our members agreed to forgo the priority of our water rights for one year in exchange for three essential commitments by the other parties: immediate relief for spring users affected by declining spring flows; intermediate action and relief to address ongoing water losses; and development and implementation of a credible, long-term plan for aquifer recovery and spring flow restoration.

The ESPA crisis is a consequence of long term inaction and avoidance. Despite the acknowledged impact of groundwater withdrawals on the ESPA and the Thousand Springs reach, the Idaho Department of Water Resources (IDWR) permitted and licensed new ground water rights over the course of several decades. The drought is not the cause of the crisis. Drought is an inevitable part of the natural hydrologic cycle. Drought is the reason the prior appropriation doctrine has been followed in Idaho since before statehood. Like drought, the prior appropriation doctrine applies to water shortage resulting from declines in seepage loss or return flows. A water right entitles the owner to the public water supply, whether or not that water supply is influenced by "incidental" recharge. A water right is protected in Idaho by the Constitution as valuable property, and in times of shortage, those previously-established property rights are protected from being taken by those who established their rights to the same water resource later in time.

The decades of inaction and avoidance were characterized by the failure to allocate and distribute water from the ESPA in accordance with the prior appropriation doctrine. New water rights were permitted and have been used without adequate consideration of their impact on senior rights. During this same period, the State of Idaho failed to institute a recharge program, despite the well-documented need and opportunities for recharge, and the passage of legislation to implement recharge. As a result, spring flows declined, senior rights were not satisfied, and the Musser call highlighted the perfect storm that was brewing. Since then, groundwater users advocated and secured adoption of the Conjunctive Management rules which, as the Idaho Supreme Court has observed, do not provide for administration in accordance with prior appropriation. Groundwater users have unsuccessfully attempted to limit spring water rights in the Snake River Basin Adjudication through unfounded theories of forfeiture and the repeated attempt to impose facility volume limitations on aquaculture rights.

The ESPA Agreement was possible because spring water users took action in 2003 to protect their water rights. The IDWR responded by ordering junior water users to curtail their pumping as required by the prior appropriation doctrine, or provide mitigation as allowed by the Conjunctive Management rules. These actions focused water users' attention and brought to the negotiating table people who previously had been avoiding each other and the real issues. The ESPA Agreement includes State commitments to address the State's responsibility to allocate and distribute water in accordance with the prior appropriation doctrine and to implement recharge and other programs to restore the water supply. It also includes groundwater user commitments to begin to address the depletive effects of their diversions, and mitigate for the impacts of those depletions on spring water users.

But despite the progress made through the ESPA Agreement, the strategy of avoidance continues to hinder progress toward a viable, negotiated alternative to litigation and curtailment. Much has been said recently to attempt to diminish, limit, or qualify our members' decreed water rights in order to steer the State of Idaho away from following the constitutionally-protected prior appropriation doctrine. We have not engaged these arguments publicly in the hope that the

Natural Resources Interim Committee

July 30, 2004

page 3

Interim Committee and the interested parties will return to productive negotiations before expiration of the one-year ESPA Agreement. Now time is short, and the need to engage the issues directly rather than avoid them becomes increasingly urgent.

We agree with IGWA that the State must play the leading role in restoring the ESPA and the Thousand Springs, and that the State must put much greater resources to effectuate meaningful recharge. However, by failing to address or mitigate for the depletive effects of their groundwater withdrawals as part of their proposed "designated Management Program implementation responsibilities," IGWA's proposed agreement steps backward into a mode of avoidance. As history has shown, this cannot be the starting point for further negotiations as IGWA suggests. IGWA proposes the ambiguous concepts of "water management planning" to supplant administration in accordance with priority, and would subordinate our members' water rights without the kind of mitigation contemplated by even the Conjunctive Management Rules. Under IGWA's proposed settlement, the priority of senior water rights would be set aside, and out-of-priority diversions by junior water rights would continue to deplete the ESPA and eviscerate the Thousand Springs, with no real provision to restore the livelihoods of our members.

We have submitted to the Committee in writing and through Linda Lemmon's June 24th presentation the essential elements of a negotiated solution to the ESPA water crisis. The written materials are attached. The foundation of these negotiations must be that there will be no attempt to alter spring water rights as decreed or to alter the prior appropriation doctrine: first in time is first in right. Long-term efforts for aquifer recovery and spring restoration, such as recharge, and other projects to increase spring water supplies and improve efficiencies, should be continued and expanded. Until the goal of restoring spring supplies to fulfill senior spring rights is achieved, groundwater users must be required to mitigate for the depletive effects of their diversions. Water is preferred but, in the interim, until water rights are restored, monetary compensation must be negotiated. Federal drought relief should be aggressively pursued as well. We remain committed to our goals of protecting our water rights and restoring the aquifer.

Since time is short, we felt compelled to respond to IGWA's proposed settlement so that there would be no confusion about the TSWUA's position in these negotiations. We remain committed to working with the Committee and all parties to find a negotiated alternative to conflict that will truly address our members' needs. However, the proposed agreement offered by IGWA simply is not acceptable.

Respectively Submitted by

The Board of Directors of the Thousand Springs Water Users Association, Inc.

ESPA Mitigation and Administrative Framework – The Basics
Submitted to the ESPA Working Group by the
Thousand Springs Water Users Assoc., 24 June 2004

The Thousand Springs Water Users Association was created, in part, to represent and protect the water rights that our family members established so many years ago. It was also formed to obtain and distribute mitigation funds and other forms of relief intended to offset losses resulting from declining spring water supplies.

To that extent, the Association hired Judge Daniel Hurlbutt to help develop standards and procedures for administering the mitigation funds the Association will receive in July. With his assistance, notices were sent to more than 550 spring water users in the Thousand Springs Reach, giving them the opportunity to become members in the Association, and to apply for funds. We are currently in the process of receiving those responses.

The individuals and entities that received those letters hold over 650 spring water rights between Bliss and Twin Falls. These rights date from 1878 to the present, and vary in quantity from 0.02 cfs to 900 cfs. 42% of those spring rights have priority dates between 1878 and 1905; 61% between 1878 and 1950. Understand also that a single water right may serve many users. For example, the spring source for the Hagerman Water Users Assoc. serves 60 households, Big Springs serves over 50 households, Banbury at least 20, and so on. The domestic supplies for the cities of Hagerman and Twin Falls are from springs.

Our members depend on the Thousand Springs to support our families, our businesses and employees, and our communities. Our water rights and our spring flows are the foundation of our lives. The chronic declines in spring flows threaten our livelihoods. Declines are so acute that some springs no longer flow, while others are down 15, 30, 50, and as much as 85% from decreed rights. We've heard complaints from those who have lost their drinking water sources, and concerns from a family whose water source has dropped so low that they were forced to install filters to remove the debris coming through their tap. We know of a family who has to choose between turning on the air conditioner, sprinkling the lawn, using the washing machine, or flushing the toilet – they can't do more than one at a time because the sole spring is so low. We've received questions from business owners wondering whether the tourism industry built around the wildlife, recreation, and scenic springs will continue to sustain their businesses. Flows through the wildlife management area have dropped enough to cause ponds to freeze, so that waterfowl fly over Hagerman instead of landing. This directly affects public and private hunting operations. And then there's the retiree who no longer believes that he'll be able to supplement his disabled veteran's pension with his small farm income.

While spring rights for fish propagation have been highly criticized, the greatest beneficial use is by far irrigation. Less than 25% of the spring rights in the Thousand Spring Reach are for fish. Other beneficial uses include stockwater, domestic and commercial use, minimum instream flow, recreation, aesthetics, wildlife, fire protection, and power generation.

There's been grumbling that we can solve this water crisis by simply buying out the fish hatcheries. Buying out a non-consumptive user will not solve the problem. Take Billingsley Creek, for example. Water is supplied to four hatcheries plus a state-operated research facility, a state-owned park, a federal wildlife management area, a private hunt club, several irrigators; it provides minimum flow to for resident fish for fly-fishing, and it provides eye appeal to tourists staying at a local lodge, all before entering the Snake River. Then it's available for instream flow, endangered species habitat, wildlife, recreation, irrigation, hydropower, and aesthetics. No, buying out a non-consumptive user will not solve the problem. And in this particular case, it may exasperate the situation if those remaining users are without water, as some of the most senior water rights in the Thousand Springs Reach, dating between 1880 and 1884, are located along Billingsley creek.

So how do we begin to approach this problem? First and foremost to lay the foundation to protect our water supplies and our livelihoods, water rights across the ESPA must be respected and enforced as valuable property rights. This basic need has been the foundation of Idaho's constitution and water laws, its economy, and its culture since the earliest days of statehood. Water rights must be administered as decreed or licensed. There can be no administrative or legislative alteration of the prior appropriation doctrine.

Restoration of the Thousand Springs requires recovery of the Eastern Snake Plain Aquifer from the effects of both ground water withdrawals and drought. We recognize that ESPA recovery, through management of ground water rights and recharge, is a long-term goal that will require significant, ongoing commitment of time and resources from the State of Idaho, the federal government and various water users. We understand that private and public institutional barriers must be overcome to achieve long-term aquifer stabilization and recharge. Thus, we support the concept of a central entity to monitor and administer recharge efforts, and need the flexibility to recharge outside the normal irrigation season. Key to this will be acquiring consistent water supplies. Like groundwater users, spring users are asking for assurances to make business plans from year to year.

In order to protect our livelihoods and our water rights until this long-term goal is met, and avoid widespread curtailment of junior ground water rights, our members require action and relief to mitigate for the effects of ground water withdrawals and the effects of drought. To continue diverting water, junior water right holders must be required to mitigate for the depletionary effects of their withdrawals on senior water right

holders, just as new appropriations are required to provide mitigation for their new water rights. Adequate mitigation and relief is an acceptable, interim alternative to mandatory curtailment.

Obviously, we would prefer mitigation that provides usable water directly to the springs and our diversions. To this end, both private and government-funded projects to increase spring water supplies and improve efficiencies should be continued and expanded.

To the extent that water cannot be provided, in order to forgo the priorities of our rights, our members must receive compensation for the depletionary effects of junior groundwater withdrawals. Financial compensation should be at a recognized rate for water, such as that provided in the recent settlement of the Nez Perce Tribe's Snake River Basin Adjudication instream flow claims. To mitigate for the effects of drought, the Association is pursuing various avenues through standard State and Federal assistance programs. We recognize that financial mitigation and drought relief may not be adequate substitutes for water for specific spring users, such as cities.

As recognized in the one-year Eastern Snake Plain Aquifer Mitigation, Recovery and Restoration Agreement, curing the water crisis in an way that respects and enforces water rights as valuable property requires a multi-faceted effort to provide interim mitigation and relief while the parties develop and implement a credible, long-term plan for aquifer recovery and spring restoration. Our members are committed to working with the ground water users, the canal companies, cities, the State of Idaho, and the Idaho congressional delegation to find acceptable solutions.